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JAMES H. McKENN

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

No. 198

LOUISVILLE & NASHVILLE RAILROAD COMPANY

vs.

SMITH, HUGGINS & COMPANY.

BRIEF ON BEHALF OF LOUISVILLE & NASHVILLE RAILROAD COMPANY, RESISTING MOTION TO DISMISS.

JAS. B. WRIGHT,
JNO. H. FRANTZ,
Solicitors for Louisville & Nashville Railroad Company

S. B. NEWMAN & CO., KNOXVILLE.

IN THE SUPREME COURT OF THE UNITED STATES.

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LOUISVILLE & NASHVILLE RAILROAD COMPANY

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REPLY OF LOUISVILLE & NASHVILLE RAILROAD COMPANY UPON MOTION TO DISMISS.

POINT 1. JURISDICTION.

The Federal question in this case grows out of *Section 3 of the Act of February 4th*, 1887, *supplement to Revised Statute United States, Vol.* 1, *page* 529, governing Interstate Commerce which said Act provides as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular description of traffic, to any undue or unreasonable

prejudice or disadvantage in any respect whatsoever. Every common carrier, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines.

"But this Act shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

The brief heretofore filed in this cause going to its merits contains a full statement of the case and various authorities relied upon by the Louisville & Nashville Railroad Company in support of its position. In that brief we have also discussed the question of this Court's jurisdiction and cited authorities in support thereof. In opposition to this motion we rely upon our original brief but desire to supplement the authorities therein cited by additional citations.

As stated in the original brief on account of the fact that the complainant instituted this suit upon the theory that the Southern Railway Company and Louisville & Nashville Railroad Company were "connecting carriers" as to these shipments and that the cars were shipped on through bills of lading the Louisville & Nashville Railroad Company had no notice that a Federal question would arise in the case, but after the issues were made up, the proof taken and that theory of the case completely disproved and the complainant's bill dismissed by the

Chancellor as to the Louisville & Nashville Railroad Company and the record filed in the Supreme Court for error as to the Louisville & Nashville Railroad Company, the complainant shifted its position and under the broad practice of pleading in the State Court was allowed to proceed and procure judgment against the Louisville & Nashville Railroad Company upon the theory that it had discriminated against this shipper by preferring its own business; that it had failed to furnish equal facilities for interchange as to these shipments and that on account of its previous switching arrangements with the Southern Railway Company it had no right to refuse to "switch" the cars over its terminals.

When the case was appealed from the Chancery Court of Jefferson County, Tennessee, to the Supreme Court of Tennessee by writ of error, the Supreme Court of Tennessee referred the record to the Court of Chancery Appeals in order that that Court might pass upon the facts. The Supreme Court of Tennessee failed to file a written opinion as a part of the record so that we must be content in this case with the opinion of the Court of Chancery Appeals, which shows that a Federal question was necessarily involved and that there could have been no other law applicable.

Complainants' bill in this case charges that the goods were delivered to the Southern Railway Company at various East Tennessee points and consigned to Birmingham, Alabama, which allegations in themselves make the subject matter of this lawsuit a subject of interstate commerce.

Transcript, page 11.

Complainant's bill further charges that the goods were delivered to the Southern Railway Company as initial carrier and that the defendant Louisville & Nashville Railroad Company being the connecting and ultimate carrier and as such carrier was bound by said contracts made by the Southern Railway Company and the law relative to common carriers to receive said several cars of corn, forward and deliver them to destination whereunto consigned in good order and in reasonable time.

Transcript, page 12.

Complainants further allege in their bill that "defendants, or one of them, breached the said several contracts aforesaid in that they or one of them wrongfully, negligently and carelessly delayed the delivery of the said several cars of corn for an unreasonable and unnecessary time and failed and refused to carry and deliver said several cars of corn in good order and in reasonable time as contracted and as they were bound to do, etc."

Transcript, page 12.

Anticipating the remote contingency that a Federal question might arise the Louisville & Nashville Railroad Company interposed in response to these allegations the following plea:

> "And touching the allegations made in Section 11 of said bill with relation to this respondent, it is admitted that respondent was and is a common carrier of goods and chattels for hire, in certain states and portions of the country where it operates lines of railroad; but respond-

ent denies the allegations that it was a connecting and ultimate carrier of the car loads of corn alleged to have been delivered to the Southern Railway Company; and denies that it was bound by the alleged contracts of the complainant with the said Southern Railway Company or any of them. *It also denies that it was bound by law to receive said alleged car loads of corn and forward and deliver them to their ultimate destination in good order and reasonable time.*"

Transcript, page 15.

We submit that this general denial sufficiently raised the Federal question even if it should be held necessary to raise it in the pleadings.

We concede that the mere fact that Chief Justice Beard in his certificate referred to a Federal question is not of itself a sufficient compliance with the rules of this Court and that the certificate of the Chief Justice is not a part of the record, but this fact does show conclusively that the question was raised in the lower Court and corroborates our position that a Federal question was necessarily involved in the decision of the case.

This Court has held that although a certificate in itself is not sufficient to confer jurisdiction, still it may have the effect of making more certain and specific what is too general and indefinite in a record.

Parmelee vs. Lawrence, 11 Wall., page 36.

Brown vs. Atwell, 92 U. S., page 327.

Yazoo & M. Valley R. R. Co. vs. Adams, 180 U. S., page 41.

Dibble vs. Bellingham Bay Land Co., 163 U. S., page 63.

The certificate may induce the Supreme Court where the question is a close one not to construe the record so strictly as to hold that it does not sufficiently present a Federal question.

Roby vs. Colhour, 146 U. S., page 153.

The decision in this case was not based upon the statute of any State and as there is no common law right of action for discrimination and as the subject matter of the suit is interstate commerce, the construction of the Act of Congress regulating commerce was necessarily involved in the proper decision of the lawsuit. In the absence of the Act of Congress the complainants would not have had any right of action at all.

Even though the State Court did not in its opinion expressly refer to the Federal Constitution, if the bill of affirmance necessarily denied federal rights claimed by the defendant the writ of error will lie.

Roby vs. Colehour, 146 U. S., page 153.

Green Bay and N. Canal Company vs. Patten Paper Company, 172 U. S., page 58.

The Supreme Court of the United States has jurisdiction in error over a judgment of the Supreme Court of the State when it necessarily involves the decision of the question raised in the appellate court for the first time and noticed in its opinion whether a statute of the State conflicts with the Constitution of the United States.

Arrowsmith vs. Harmoning, 118 U. S., page 19.

Chicago L. Co. vs. Needles, 113 U. S., page 574.

McCullough vs. Virginia, 172 U. S., page 102.

Chapman vs. Crane, 123 U. S., page 540.

Green Bay and N. Canal Co. vs. Patten Paper Co., 172 U. S., page 58.

The Federal question is involved if the effect of the State decision is to construe the Act alleged to violate the federal constitution although the State Court does not mention the statute.

Houston & T. C. R. R. Co. vs. Texas, 177 U. S., page 66.

It is not always necessary that the Federal question should appear affirmatively on the record or in the opinion if an adjudication of such question was necessarily involved in the disposition of the case by the State Court.

Kaukauna Water Power Co. vs. Green Bay N. Canal Co., 142 U. S., page 254.

Snell vs. Chicago, 152 U. S., page 191.

If it appear from the record by clear and necessary intendment that the Federal question must have been directly involved so that the State Court could not have given judgment without deciding it that will be sufficient to give jurisdiction.

Powell vs. Brunswick County, 150 U. S., page 433.

Armstrong vs. Athens County, 16 Pet., page 284.

It is not necessary that the question should appear on the record to have been raised and the decision made

in direct and positive terms *ipsissimis verbis;* but it is sufficient if it appears by clear and necessary intendment that the question must have been raised in order to have induced judgment.

Crowell vs. Randell, 10 Pet., 368.

It is not necessary that the Act of Congress on which the Federal right is based should have been pleaded specially or spread on the record. It is sufficient if the record shows that it must have been misconstrued.

McCullough vs. Virginia, 172 U. S., 118.

A refusal or failure to consider a Federal question is equivalent to a decision against the Federal rights involved therein.

Des Moines M. & R. Co. vs. Iowa Homestead Co., 123 U. S., page 555.

Erie R. Co. vs. Purdy, 185 U. S., page 148.

Where a party relies upon an Act of Congress and the questions considered by the Court and upon which the case turned were whether the party had brought himself within the scope of that Act, a Federal question is presented.

San Jose Land & W. Co. vs. San Jose R. Co., 189 U. S., page 177.

The State Court could not have reached a conclusion adverse to the plaintiffs-in-error without holding either that none of its property had been taken or that it was not entitled to compensation therefor, which is

equivalent to saying that it had not been deprived of its property without due process of law. Thus was presented a Federal question reviewable in this Court.

Kaukauna Water Power Co. vs. G. B. M. C. Co., 142 U. S., page 254.

The answer and claim made by defendant in the State Court that the Act of Congress furnished a complete defense to the action to enforce a state statute raised a Federal question and the overruling of that defense by that Court gives the Supreme Court jurisdiction to review the State judgment.

Missouri K. & T. Co. vs. Haber, 169 U. S., page 613.

In re Lennon, 166 U. S., page 553, this Court used the following language:

"Irrespective of this, however, we think the complainants exhibit a case which arises under the constitution and laws of the United States. The case appears to have been brought solely to enforce a compliance with the provisions of the Interstate Commerce Act of 1887 and to compel the defendant to comply with such Act by offering proper and reasonable facilities for the interchange of traffic with the complainant and enjoining them from refusing to receive from complainants for transportation over their lines any cars which might be tendered them. It has been frequently held by this Court that a case which arises under the constitution and laws of the United States whenever the party plaintiff sets up a right to which he is entitled under such laws which the party defendant denies to him and a correct decision of the case depends upon the construction of such laws."

In re Lennon, 166 U. S., page 553.

The latest utterance of this Court upon the subject is found in the case of Chicago, B. & Q. R. Co. vs. Illinois ex rel., Grimwood, in 200 Supreme Court Reports, 50 Law Ed., p. 604, in which the following language is used:

> "I. The first question is one of authority of this court to review the judgment below. As we have seen, the railway company insisted in the court of original jurisdiction that the statute under which the drainage commissioners proceeded could not be applied in this case without compensation and therefore depriving it of property without due process of law, or without denying to it the equal protection of the laws, guaranteed by the Constitution of the United States. The judgment of the trial court was adverse to that view. In the Supreme Court of the State the railway company, by its assignments of error, preserved its objection based on constitutional grounds. That court did not, in words, refer to the Constitution of the United States, and its opinion concluded: 'Entertaining the views above expressed, and founding our conclusion upon the rights and duties of the parties as found in the common law, we deem it unnecessary to pass upon the constitutionality of 40½ of the farm drainage Act." (212 Ill., 120, 72 N. E., 225.)
>
> The contention is that as the State Court based its judgment on the common law duty of the railway company, and not expressly on any Federal ground, it can not be said that there was any denial of the Federal right claimed by the company; consequently, it is argued, this court is without jurisdiction to re-examine the final judgment. Rev. Stat., 709, U. S. Comp. Stat. 1901, p. 575.
>
> Undoubtedly, the general rule is that where the judgment of the State Court rests upon an in-

dependent, separate ground of local or general law, broad enough or sufficient in itself to cover the essential issues and control the rights of the parties, however the Federal question raised on the record might be determined, this court will affirm or dismiss, as the one course or the other may be appropriate, without considering that question. But it is equally well settled that the failure of the State Court to pass on the Federal right or immunity specially set up, of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment from one resting upon some ground of local or general law. And such plainly was the effect of the judgment in this case. If, as the railway company contended, the proposed action of the drainage commissioners would deprive it of property without due process of law and also deny to it the equal protection of the laws, then a judgment should have been rendered for the company. And that result could not be avoided merely by silence on the Federal question, and by placing the judgment on some principle of the common law. The constitutional grounds relied on must, if sustained, displace or supersede any principle of general or local law, which, but for such grounds, might be sufficient for the complete determination of the rights of the parties. The claim of a Federal right or immunity specially set up from the outset went to the very root of the case and dominated every part of it. If that claim be valid, then the law is for the railway company; for the supreme law of the land must always control. Therefore a fail-

ure to recognize such Federal right or immunity, and the decision of the case on some ground of general or local law, necessarily has the same effect as if the claim of Federal right or immunity had been expressly denied. That claim having, then, been distinctly set up by the company, and being broad enough to cover the entire case, it may not be ignored, and this court can not refuse to determine whether the alleged Federal right exists and is protected by the Constitution of the United States. If the case had been decided in favor of the railway company on some ground of local or general law, then the claim of a Federal right would have become immaterial, and we could not have re-examined the judgment. But the decision was otherwise, and was, in law, a denial of the claim of a Federal right.

For these reasons we are of the opinion that this court has jurisdiction to re-examine the final judgment of the State Court so far as it involved the Federal right or immunity specially set up by the railway company."

POINT 2. ON THE MERITS.

REPLY TO DEFENDANT IN ERROR.

Although, as before stated, we have covered the various features of this case fully in our brief on the merits we shall here briefly refer to a few of the authorities cited in the brief for defendant in error.

We concede that the findings of fact of the Court of Chancery Appeals of Tennessee were conclusive upon the Supreme Court of Tennessee and that this Court will not go behind those findings. At this juncture we wish to call the Court's attention to the fact that the Court

of Appeals at first delivered a very general opinion but upon being petitioned for a further finding of fact set them forth more elaborately.

Transcript, pages 60-77.

It is upon these findings that the plaintiff-in-error, Louisville & Nashville Railroad Company, relies in this proceeding.

The case of Memphis News Publishing Co. vs. Southern Railway, 110 Tenn., page 684, relied upon by defendant in error in no wise supports its position. The theory of that case was that the Railroad Company (a conceded common carrier) was granting to the Commercial Publishing Co. an undue, unreasonable and unlawful preference over the complainant by transporting papers on a regular scheduled train to distant communities and refusing to carry them for the News Publishing Company on the same terms. In the course of the opinion the Court said:

"The train in question is a scheduled one and is advertised to the world as such. An invitation is given to the public to take passage and ship freight on it. So far as the records show it received upon this train merchandise from every other member of the community and refused carriage of papers for the complainant and this refusal is based not upon a lack of carrying capacity but exclusively upon the ground that it has contracted away its duty, in respect to such property as the complainant has tendered, to another party."

The Court further said:

"From the beginning the Railway Company has itself recognized that it was operating this train as a part

of the common carrier service. It was in no sense a specially chartered train with freight and passengers as simply incidentals."

The case of Avinger vs. Railway Co., 13 Am. St. Rep., 716, can have no bearing whatever upon the case at bar. There was no doubt in that case that the Railway Company was acting as a common carrier. The service denied was not a "switching" service but a carrier service.

The case of Peoria & Pekin United Ry. Co. vs. Chicago R. I. & P. Ry. Co., 190 Ill., is not at all in point. The defendant in that case was not an ordinary railroad company but seems to have been a mere terminal or transfer company. The question in that case was not whether the company had the right to refuse the cars or not, but whether the company was liable for the contents of the cars destroyed in its possession when it had received the same and was proceeding to do the transferring for a compensation.

It was conceded that the receiving company in carrying the goods on the car was acting as a common carrier but it was insisted that as to the rolling stock it was not acting as a common carrier. The Court simply held that there was no difference between the relation as to the goods being carried and as to the vehicle belonging to the said company in which the goods were being carried. The question of the right to refuse the car was never considered. It was not refused and there was no desire to refuse it.

In addition to the case heretofore cited in the brief of the Louisville & Nashville Railroad Company we desire to call the Court's attention to the case of G. & I. Ry. Co. vs. T. & N. R. R. Co. (36 S. W. Reporter, 328), in which the Court used the following language:

"The service so demanded and refused was a switching or transfer service and the freights tendered were not routed expressly over any part of appellant's line. The sums tendered for the service were not tendered as payment for freight in the ordinary acceptation of the term but were tendered as the switching charges ordinarily demanded for such service. No way bill was tendered appellants in connection with the freight, but instead the tender was accompanied either by a switch list showing the name and number of the cars, or a transfer sheet. It was not contemplated by those making the tender that appellants should participate pro rata in the charges upon the freight tendered as fixed in the through rate."

"The service demanded was not transportation in any true sense. It did not involve a haul by appellant of such a nature as to entitle appellant to a pro rata of the through rate nor was any such pro rata contemplated by the party demanding service.

It is thus seen that a connecting line must be such as to form a link between two other roads and we think a fair construction of the language should lead to the conclusion that such connection should extend from one point to another in the state. It is believed that switches, sidings, etc., constructed by the railroad companies for the storage of cars or the more convenient handling of their business as carriers are not in a legal sense a part of their line. A connecting carrier has been defined as one of several common carriers over which any particular shipment is to pass and which shall participate in the transportation of such shipment. A mere transfer company employed to haul goods from the terminus of the initial carrier to the

depot of the next succeeding carrier in the same city is not a connecting carrier."

Citing Ry. Co. vs. Young, 25 Nebraska, 651, 41 N. W. Rep., 646.

"The question remains, however, whether appellants having voluntarily performed like switching service for another road thereby subject themselves to the imposition of a like duty as to all roads tendering like business and offering like compensation?

"We think there is a clear distinction between shifting or transfer service and transportation proper. The duty to perform the latter is clearly imposed. We have been able to find neither statute nor decision imposing the former except as a duty incident to transportation which the railroad has been required to perform. The distinction between switching and transportation proper has been discussed in various cases and the distinction upheld."

Citing National Tube Works Co. vs. B. & O. R. R. Co., 8 Atl. Rep., p. 6.

In the case cited the Court said:

"The switching charges when the switching was necessarily performed by a road other than the carrier undertaking to transport the freight are not to be included in the rate charged for transportation but are entirely separate and distinct services."

In that case the distinction was upheld when applied to switching done by the carrier itself, the switching being shown to have been done not as a necessary

incident to the transportation, but for the convenience of the shipper.

Continuing the Texas Court said:

"It is not contended that the switches and yards of appellants were constructed for the purpose demanded or that their charters authorized them to construct mere terminal facilities for another road at Beaumont. Indeed it is easily seen that the transfer business might have been carried to such an extent as to become a detriment or obstacle to the operation of appellant's lines for the purposes for which they were mainly designed. * * * We are of the opinion that the services demanded of appellants could have been performed or not, as they saw fit."

The Court further said:

"The undisputed facts show that they were not connecting carriers and hence that they were not required to perform this service unless they saw fit."

Another case which is particularly applicable is L. & N. R. R. Co. vs. West Coal Company (198 U. S., page 483). This is a case where an individual or rather a private enterprise sued the railroad company for damages for refusing to permit it to use the wharf of the railroad company at Pensacola for the transportation of plaintiff's property. The railroad company denied its right to use its terminals.

In its opinion this Court said:

"We are of the opinion that the wharf was not a public one but that it was a mere facility erected by and belonging to defendant and used by it in connection with that part of its road forming an extension from its regular depot and yards in Pensacola to the wharf for the

purpose of more conveniently permitting the transportation of goods beyond its own line and that the defendant need not share such facility *with the public* or with any carrier other than those it chose for the purpose of effecting such further transportation. *Neither the public* nor the plaintiff had such an interest in the wharf as would give to either the right to demand its use on payment of reasonable hire."

In that case this Court further said: "We do not see that the plaintiff had any right to demand that the defendant should carry plaintiff's goods on the rails defendant had laid down to reach the wharf from its depot and yards at Pensacola, the terminus of its road at that city."

"Those rails were only laid for the purpose of reaching the wharfs in order that defendant might carry goods that it had undertaken to forward by itself or by vessels it had arranged with, beyond its line. Very likely it would be bound to carry plaintiff's goods on this part of its rails for the same purpose and on the same terms it did for others, viz.: In order that it might itself or through others it had contracted with, forward the goods beyond its own line. But plaintiff demands more than this. It demands that defendant should carry plaintiff's goods over its rails thus laid in order that plaintiff may itself forward the goods by vessels of its own selection and that defendant shall surrender possession of enough of its wharf to enable plaintiff to do so.

That the defendant had the right to choose its own agencies and grant to them the exclusive privileges of access to its own wharf which it built only for the purpose of continuing the transportation of goods which it had

transported to the end of its line has in effect been decided by this Court.

Citing Atchison Railroad Co. vs. Denver & N. O. R. R. Co., 110 U. S., page 667.

Continuing, this Court said:

"Having the right, as the authorities prove, to decide what agencies it would employ for the purpose of transporting goods beyond its own line and not being bound to enter into any contracts or arrangements with *one person* or carrier because it had so contracted or arranged with another, we think it follows that defendant was not obliged to permit the public to have access to its wharf built for the purposes stated, simply because it granted such permission to those with whom it made arrangements of the kind set forth in the plea."

L. & N. R. R. Co. vs. West Coast Naval Store Company, 198 U. S., pages 495-496 and 497.

As to the right of a railroad company to discriminate to the extent of protecting itself we wish to call the Court's attention to the case of Texas & Pacific Railway vs. I. C. & C. Co., 162 U. S., page 197.

In conclusion we submit to the Court that when the shipments in controversy in this case were made from one state to another they became interstate commerce and as such were controlled by the Act of Congress regulating commerce and the rights of all parties became fixed under the Interstate Commerce Act. That Act defines the right of shippers to handle freight interchanged beyond the terminus of the initial carrier and the connect-

ing carriers' duty to receive it for interchange from the initial carrier and the shipper would have only such rights as were thus given him under this Act.

The Louisville & Nashville Railroad Company claimed that it was not required to "switch" these cars in its Birmingham yards as the effect of it would be to require it to turn over to the Southern Railway Company its terminal facilities.

The lower Court disregarded its right in the premises under said Act and by indirection gave to the complainant below damages for refusing to do what the law expressly provides that it should not be required to do.

We respectfully insist that the Federal question was necessarily involved in the decision of this case, that it was in fact raised, and that the case was wrongfully decided against this plaintiff in error and should be reversed.

Respectfully submitted,

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